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IN THE
Supreme Court of the United States

October Term, A.D. 1952

209
No.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, Petitioner.

vs.
ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTA-
WATTAMIE COUNTY, IOWA, Respondents.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, Petitioner.

vs.
ARCHIE C. STUDE, Respondent.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, Petitioner.

vs.
ARCHIE C. STUDE and WILLIAM LUMPKIN, Respondents.

PETITION FOR WRIT OF HABEAS CORPUS TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT AND BRIEF IN SUPPORT
THEHEREOF.

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CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, *Petitioner,*

vs.

ARCHIE C. STUDE and WILLIAM LUMPKIN, *Respondents.*

**PETITION FOR WRIT OF HABEAS CORPUS AND BRIEF
IN SUPPORT THEREOF.**

TO THE HONORABLE SUPREME COURT OF THE
UNITED STATES:

Petitioner, Chicago, Rock Island and Pacific Railroad
Company, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF MATTER INVOLVED.

By the decision of the Court of Appeals for the Eighth Circuit, review of which is now sought, petitioner, a railroad corporation of Delaware, was denied access to the United States District Court for Southern Iowa to litigate

the amount of its liability to citizens of Iowa for the taking of ten parcels of Iowa real estate under Iowa law of eminent domain, although diversity of citizenship and jurisdictional amount with respect to each of the ten parcels were present. A majority of the judges who heard this case below held that since Iowa law provides only for an "appeal" to the state courts from the award of sheriff's commissioners, petitioner could not, as plaintiff, institute an action in United States District Court for Southern Iowa; and, since petitioner itself initiated the condemnation proceeding, it was not a defendant within the meaning of Tit. 28, Sec. 1441, U.S.C.A., although so designated by state statute, and, therefore, could not remove an appeal from the administrative award, docketed in the state court, to the United States District Court. Thus, the Eighth Circuit Court of Appeals, with its Chief Judge dissenting, ruled that because of statutory provisions found in the law of Iowa and many other states, the District Courts of the United States lacked jurisdiction over these civil actions, although in each instance, the controversy involves more than the jurisdictional amount and is wholly between citizens of different states.

Petitioner was authorized by certificate of the Interstate Commerce Commission to construct approximately 34 miles of new railroad line in Pottawattamie and Cass Counties, Iowa, and to abandon certain existing trackage. Certain landowners and others, including a number of respondents, opposed petitioner's plans before the Interstate Commerce Commission, and brought a suit in the United States District Court for Southern Iowa to set aside the Commission's certificate. A three judge District Court sustained the order of the Interstate Commerce Commission. (Not published in F. Supp.)

Petitioner acquired all necessary right of way except the ten parcels here involved; and with respect to those,

was authorized to institute condemnation proceedings by the Iowa State Commerce Commission. Since no statute of the United States grants railroad corporations power to condemn lands, petitioner was necessarily remitted to the laws of Iowa on that subject. In Iowa any railway corporation, when authorized by the State Commerce Commission, may condemn land for railroad purposes. The pertinent Iowa statutes are printed in the appendix, and are here briefly summarized:

(a) An administrative proceeding is initiated by the filing of a written application with the sheriff of the county in which the land to be condemned is located, describing the lands affected and to be condemned. (Sec. 472.13, Iowa Code 1950)

(b) The sheriff thereupon appoints a commission of six resident, disinterested freeholders of the county to assess the damages to all real estate in the county desired by the applicant.

(c) After notice to all owners and lienholders, this commission "views, if necessary, the land sought to be condemned", assesses the damages which the owner will sustain, and files a written report thereof with the sheriff. (Sec. 472.14, Iowa Code 1950)

(d) The appraisement of damages returned by the commission is final unless appealed from. (Sec. 472.17, Iowa Code 1950)

(e) Any party interested may within thirty days after the assessment is made "appeal therefrom to the district court." (Sec. 472.18) The "appeal" is docketed in the name of the owner of the land, or of the party otherwise interested and appealing, as plaintiff, and in the name of the applicant for condemnation, as defendant, and be tried as in an action by ordinary proceedings. (Sec. 472.21, Iowa Code 1950)

—4—

This Court, the Supreme Court of Iowa, and the United States Court of Appeals for the Eighth Circuit had all previously held that Iowa law prescribes a purely administrative proceeding, in the nature of an inquest, which is not judicial in character, or a "civil action" until the taking of an appeal from the commissioner's award.

See Mason City & Fort Dodge R.R. Co. vs. Boynton,
204 U.S. 570, 51 L.Ed. 629.

Myers vs. C&NW R.R. Co., 118 Iowa 312, 91 N.W.
1070.

Des Moines Water Co. vs. City of Des Moines, 208
Fed. 657.

*Kau Valley Drainage District vs. Metropolitan
Water Co.*, 188 Fed. 816.

Because of the prior litigation with local residents, counsel for petitioner desired to initiate the necessary proceeding for condemnation in the United States Courts; but, in view of the decisions cited above, concluded that the United States District Court could not take jurisdiction over the administrative action prescribed by Iowa statutes. The proceeding before the sheriff is clearly not a "civil action" within the statute defining the original jurisdiction of District Courts. (See Tit. 28, Sec. 1332, U.S.C.A.) Petitioner, therefore, followed the procedure prescribed by Iowa statutes, and on January 18, 1952, filed with the Pottawattamie County Sheriff its application in writing for the appointment of commissioners and assessment of damages with respect to the ten parcels of real estate. After notice to the landowners, tenants and others interested, ten awards were made on February 12, 1952, aggregating more than \$330,000, each of which very substantially exceeded \$3,000. Petitioner deposited the amount of some of the awards with the sheriff and took possession of the land.

On March 7, 1952, petitioner, as plaintiff, filed in the office of the Clerk of the United States District Court for

Southern Iowa ten separately docketed complaints, in each of which the owners of the real estate condemned, their tenants and lienholders were designated as defendants. Each complaint alleged the filing of the administrative condemnation proceeding, the appointment of commissioners, the assessment of damages in favor of the landowner, and tenant, and a description of the lands condemned. It charged that the award was grossly excessive, unreasonable and far in excess of any actual damage sustained by defendants. The complaint recited that a notice of appeal from the award of the sheriff's commissioners had been served on the sheriff, the landowner and tenant, a copy which was made an Exhibit to the complaint. In the case of Archie C. Stude (Record 1), the complaint set forth an award of damages of \$23,553.00 to the landowner and \$1,000.00 to his tenant for taking of 24.47 acres, while it was claimed actual damage sustained did not exceed \$10,000. Allegations of diversity of citizenship and jurisdictional amount appeared in each complaint. The prayer of each complaint was that the damages be fixed and determined upon the trial of the action.

Summons was duly issued by the Clerk of the District Court in each case in the usual form, citing all named defendants in each case to answer the complaint within twenty days after service (Record 9). The summons, accompanied by a copy of the complaint, was served on each defendant by the Marshal.

On March 10 and 11, 1952, petitioner served upon the sheriff and upon each landowner, and other interested party, notices of appeal to the District Court of Pottawattamie County, Iowa, in compliance with Iowa law, as to each of the ten parcels of real estate. Petitioner then filed the ten notices of appeal in the office of the Clerk of the Iowa Court, paid the filing fees and each case was there docketed on March 11, 1952. The landowner and tenant were designated

as plaintiffs and the railroad as defendant. On March 12, 1952, petitioner filed in the office of the Clerk of the United States District Court for Southern Iowa ten verified petitions for removal to that court of the ten actions pending in the Pottawattamie County, Iowa, District Court. These removal petitions contained all jurisdictional averments necessary for removal of cases to the United States District Court because of diversity of citizenship and amount in controversy. All requisite procedural notices and bonds were filed as prescribed by Tit. 28, Sec. 1442-45, U.S.C.A.

Thus, as to each parcel of real estate condemned, petitioner first filed an original complaint in the United States District Court, caused summons to be issued and served, and thereafter took all required steps under state law to appeal from the commissioners' awards to the state court, docketed the ten cases in the state court, and then removed these cases to the Federal District Court.

On March 24, 1952, the landowners filed in each original action instituted by petitioner, as plaintiff, motions to dismiss (Record 10-11, inc.), which challenged the jurisdiction of the United States Court on the ground that petitioner had elected to proceed under Chap. 472, Iowa Code 1950, and could not, having followed the procedure prescribed by Iowa law, invoke the jurisdiction of the United States District Court. On the same date, subject to such motions for dismissal, the landowners filed answers and counterclaims for damages (Record 12-17, inc.). On the same date in each of the ten removal cases, the landowners filed petitions as plaintiffs, as required by the Iowa statutes, and motions to remand the cases to the State Court on the ground that the District Court was without jurisdiction for the reason that the railroad "is not the defendant in said action within the meaning of Tit. 28, Sec. 1441, U.S.C.A., so as to be entitled to remove said action" (Record 49).

The motions to dismiss and to remand were heard by

the District Court on May 28, 1952. On July 19, 1952, District Judge William F. Riley filed a memorandum opinion and order which is set forth at Record 18-37, inc. After correctly outlining the prior proceedings (except for the statement that the appeals were first taken to the State Court), Judge Riley held that the condemnation proceeding prescribed by Iowa statutes was purely administrative, and not a "civil action"; that it was not until the case reached the courts by way of appeal that the proceeding became judicial in character. Numerous authorities from both state and Federal jurisdictions were cited in support of this conclusion. Judge Riley then stated that an action for condemnation of real estate is a civil action within the meaning of Tit. 28, Sec. 1332, U.S.C.A. and might have been commenced, in the first instance, in the United States District Court. Judge Riley ruled that petitioner, having followed state procedure in initiating the proceedings before the Pottawattamie County Sheriff, could not "go partly down the road of state procedure and then cut across from the sheriff's commissioners' award to this court" (Record 35). He likewise said that "It would be an unwarranted encroachment on the state's authority for this court to find and declare that the prescribed proceedings, despite their expressed and explicit detail, contemplate and permit an appeal from the commissioners' award directly to this court instead of to the court named by the General Assembly of Iowa" (Record 28-29).

In the ten removal cases Judge Riley's opinion pointed out that the only controversy before the court was the amount of damages to which the landowners and their tenants were entitled, that the taking of the land was complete, and that petitioner was "for every practical purpose at the time of the removal of these cases, both nominal and actual defendant" (Record 33). The motions to remand were overruled.

Petitioner appealed to the Court of Appeals for the Eighth Circuit from the judgments of dismissal (Record 30). The landowners filed what their counsel denominated a "notice of cross-appeal" in each of the cases which were dismissed. They likewise served notices of appeal from the orders overruling their motions to remand to the state court (Record 57-58). By stipulation of the parties, approved by the District Court, the appeals and cross-appeal were submitted on one printed record, the case of Archie C. Stur's, with the final judgment in that case to be entered in the other cases (Record 41-45, inc.). While petitioner contended that the orders overruling the motions to remand were not appealable orders, it consented that the Court of Appeals might determine the questions presented on both appeals.

On April 30, 1963, the opinion of the Court of Appeals was filed, affirming the judgment of dismissal and reversing the order overruling the motion to remand (Record 76-86). The opinion by Circuit Judge Collet held that Iowa law gave petitioner no right to appeal from the commissioners' award to the United States District Court, and for that reason, the judgment dismissing petitioner's action, as plaintiff, was proper. With respect to the case removed to the District Court, Judge Collet held that while the cases were not consolidated, the propriety of the order denying the motion to remand was properly before the court under the rule of *Deckert vs. Independence Shares Corp.*, 311 U.S. 282, 85 L.Ed. 189. The opinion then concludes that *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L. Ed. 629, 27 S. Ct. 321, is decisive of the issue of removability, since this court there said that a non-resident landowner was a defendant within the removal statutes. The opinion of the Court of Appeals is reported at 204 F.(2d) 116.

Petitioner by timely petition for rehearing pointed out

that the opinion of the court had ignored its contentions as set forth in its Briefs. The case of *Burford vs. Sun Oil Company*, 319 U.S. 315, not referred to in the original submission, was cited. On June 17, 1953, a majority of the Court of Appeals denied the petition for rehearing (Record 101-107). Judge Collet, speaking for the majority of the court, held that the filing of the complaint and service of summons could "not be treated as having created an original action in the Federal Court * * * since actions are not initiated in the Federal Courts by filing with a sheriff a request that he appoint commissioners to assess damages."

Thus, a majority of the court below apparently adopted the reasoning of Judge Riley that the proceeding might have been commenced in the first instance in the Federal Court; and, therefore, petitioner, could not, having filed its application with the sheriff, "switch to the Federal tribunal." Chief Judge Gardner dissented from the denial of the petition for rehearing. He pointed out that petitioner possessed all qualifications required of a plaintiff in an original action in the United States Court, and that the amount in controversy exceeded the jurisdictional amount fixed by Congress; that the proceeding before the County Sheriff was not of a judicial character, but after appeal to the courts, it was a civil action. The dissenting opinion concludes that the non-resident condemnor could not lawfully be denied access to the Federal tribunal.

The mandate of the Court of Appeals was stayed pending application to this Court for a writ of certiorari.

JURISDICTION.

1. The jurisdiction of this court to review the judgment and decision of the United States Court of Appeals for the Eighth Circuit is expressly provided for by the Federal Judiciary Act, Tit. 28, Sec. 1254, U.S.C.A. In one of the causes the action was commenced as an original action in the District Court, and the other cause was removed from the state court to the United States District Court, diversity of citizenship and jurisdictional amount being present. The jurisdiction of this court, therefore, is beyond question.

2. The date of the final judgment herein sought to be reviewed is June 17, 1953, on which date the opinion of the Court of Appeals for the Eighth Circuit was filed, denying petitioner's petition for rehearing.

THE QUESTIONS PRESENTED.

The questions presented may be summarized as follows:

1. Under state statutes of eminent domain providing for an administrative proceeding for the taking of real estate, and for an "appeal" to state courts from the award of damages, by either condemnor or landowner, is a non-resident condemnor, after serving the notice of appeal required by state law, precluded from instituting a civil action in an appropriate United States District Court where other jurisdictional requisites are present?

2. May a non-resident condemnor of real estate under state eminent domain statutes, which provide for an initial administrative proceeding before a county sheriff, institute such administrative proceedings in a United States District Court if diversity of citizenship and jurisdictional amount appear?

3. Does Rule 71-A, Federal Rules of Civil Procedure, permit an eminent domain proceeding to be initiated in an

appropriate United States District Court, or is such rule complied with by following applicable administrative procedure prescribed by state statute, and then instituting a civil action in the United States District Court, where diversity of citizenship and jurisdictional amount are present?

4. May a non-resident condemnor of real estate under state law which prescribes an "appeal" from an administrative award of damages to the state courts, and makes the condemnor a defendant in such action, remove such action from the state court to an appropriate United States District Court when other jurisdictional requisites are present?

5. Did the Court of Appeals correctly apply the provisions of Tit. 28, Sec. 1332, U.S.C.A. when it sustained the judgments of dismissal in the actions instituted by petitioner as plaintiff?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The Court of Appeals for the Eighth Circuit has decided an important question of Federal law of general interest in a manner having no support whatever in judicial precedent. The holding of the courts below that the administrative proceeding prescribed by state law constitutes a "civil action" is contrary to all prior decisions of the courts. The holding that petitioner could not, having exhausted its administrative remedy under state law, commence its action in an appropriate United States District Court denies to petitioner rights conferred by Tit. 28, Sec. 1332, U.S.C.A., which right is recognized by Rule 71-A, Federal Rules of Civil Procedure, promulgated by this court.

2. The Court of Appeals for the Eighth Circuit by its holding that petitioner may not, as plaintiff, institute a

civil action in an appropriate United States District Court, and may not, as defendant, remove a case appealed to and docketed in the state court, to the United States District Court, manifestly deprives a non-resident of rights specifically granted by Tit. 28, Secs. 1332 and 1441, et seq., U.S. C.A., which are recognized by Rule 71-A, Federal Rules of Civil Procedure. If petitioner be a plaintiff in the civil action contemplated by Iowa statutes, then it is entitled to institute the action prescribed by state law in the United States District Court. While, if petitioner be a defendant as designated by state statute, it is entitled to remove the action to the United States District Court.

3. The laws of Iowa like those of numerous other states; for example, Texas, Kansas, Kentucky and Minnesota, require that a condemnor of real estate acquire title to lands by an administrative proceeding, and then any party aggrieved may have a judicial review by a civil action in the courts. The holding of the Court of Appeals for the Eighth Circuit that a non-resident condemnor may not have access to the Federal courts for the determination of its liability to pay for lands taken presents a question of serious import and of general interest; and, in view of procedural uncertainties created by the decision of this court in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629, 27 S.Ct. 321, there is presented a question which should be determined by this court.

4. The Court of Appeals for the Eighth Circuit by its decision that a condemnor of real estate is not to be considered for removal purposes a defendant in the action, although specifically made so by state law, has misconstrued the decision of this court in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, supra; and has thereby denied to petitioner the right to resort to a Federal tribunal in a diversity case.

5. The record presents a question of general interest as to the scope and proper application of Federal Rule 71-A in diversity cases involving the exercise of eminent domain powers by a non-resident of the state.

6. The Court of Appeals for the Eighth Circuit by its decision in this cause denying petitioner access to the Federal Courts to litigate the amount of its liability to citizens of the State of Iowa for the taking of their lands, has so far departed from the usual and accepted course of judicial precedent as to justify and require the intervention of this court in order that the manifest errors of law inhering in the opinion of the Court of Appeals be corrected.

A certified copy of the record in the causes in the United States Court of Appeals for the Eighth Circuit, including the record, proceedings, opinion and disposition of the cause had in said court, is herewith furnished and lodged in the office of the Clerk of this court in compliance with the rules of this court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of, and under the seal of this court, directed to the United States Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this court, for its review and determination, a full and complete transcript of the record and all proceedings had in the cases numbered and entitled on the docket of said court as No. 14724, Chicago, Rock Island and Pacific Railroad Company, Appellant vs. Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa, Appellees; No. 14725, Archie C. Stude, Cross-Appellant vs. Chicago, Rock Island and Pacific Railroad Company, Cross-Appellee; and No. 14726, Archie C. Stude and William Lumpkin, Appellants vs. Chicago, Rock Island and Pacific Railroad Company, Appellee, and that the opinion and judgment of the United States Court of Appeals for the

Eighth Circuit may be reversed by this court, and that petitioner have such other and further relief in the premises as to this court may seem meet and just.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

A. District Courts of the United States have original jurisdiction only in "civil actions" wherein diversity of citizenship is present and the controversy involves more than the jurisdictional amount of \$3,000.,

Tit. 28, Sec. 1332, U.S.C.A.

B. If state law provides for a judicial proceeding in its courts in eminent domain cases and other jurisdictional requisites are present, a non-resident condemnor may commence an action, in the first instance in the United States District Court. The rule is otherwise in those states in which state law provides for an administrative proceeding, followed by a "civil action", triable in the courts of the state. When state law provides for an administrative proceeding, it may not be instituted in the United States District Court until the administrative procedure has been followed, and the controversy has become a "civil action".

Mississippi & Rum River Boom Co. vs. Patterson,
98 U.S. 403, 25 L.Ed. 206.

Searl vs. School District, 124 U.S. 197, 31 L.Ed. 415.

Union Pacific R.R. Removal Cases, 115 U.S. 1, 29 L.
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*Madisonville Traction Co. vs. St. Bernard Mining
Co.*, 196 U.S. 239, 49 L.Ed. 462.

Myers vs. C&NW R.R. Co., 118 Iowa 312, 91 N.W.
1076.

Des Moines Water Co. vs. City of Des Moines, 206
Fed. 657, (C.A.8th).

*Kaw Valley Drainage District vs. Metropolitan
Water Co.*, 180 Fed. 315 (C.A.8th).

II.

A. After taking all steps required by state administrative procedure under Iowa law petitioner properly commenced its action in the United States District Court, if under Federal law, it be a plaintiff in such proceeding.

Burford et al vs. Sun Oil Co. et al, 319 U.S. 315,
87 L.Ed. 1424.

Texas Pipe Line vs. Ware, 15 F.2d 171, (C.A.8th).

Ellis vs. Associated Ins. Corp., 24 F.2d 809, (C.A.
5th).

Flowers vs. Aetna Casualty & Sureties Co., 154 F.2d
881 (C.A.8th).

Northern Pacific Railroad Co. vs. Babcock, 54 U.S.
190, 38 L.Ed. 958.

United States vs. 16,572 acres of land et al, 49 F.
Supp. 555.

B. The right of a non-resident to resort to a Federal tribunal cannot be restricted, enlarged or diminished by reason of state procedural statutes.

III.

A. If petitioner be not a plaintiff in the proceeding, it is necessarily a defendant as provided by state law and, as such, entitled to remove the case from the state court to the United States District Court.

B. The majority opinion of the Court of Appeals has improperly construed the opinion of this court in *Mason City & Fort Dodge R.R. Co. vs. Boynton*.

IV.

Petitioner's action in instituting the administrative proceeding before the Iowa sheriff complied with the requirements of Rule 71-A(k).

ARGUMENT.

I.

A.

District Courts of the United States have original jurisdiction in civil actions wherein diversity of citizenship is present and the controversy involves more than the jurisdictional amount of \$3,000.

At the outset it is important that the court keep in mind the exact provisions of the statutes upon which petitioner relies. Tit. 28, Sec. 1332, U.S.C.A. provides as follows:

"The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and is between:

(1) Citizens of different states."

By the express provisions of this statute, only "civil actions" may be instituted in the United States District Courts. Purely administrative proceedings provided for by state law are not within the jurisdiction of the United States Courts. This is fundamental. It is clear, therefore, that unless the condemnation proceeding authorized by Iowa law was a civil action in its inception, petitioner could not have commenced its condemnation proceeding in an appropriate Federal court.

B.

If state law provides for a judicial proceeding in its courts in eminent domain cases, and other jurisdictional requisites are present, the non-resident condemnor may commence its action, in the first instance in the United States District Court. The rule is otherwise in those states in which

state law provides for an administrative proceeding, followed by a "civil action", triable in the courts of the state. When state law provides for an administrative proceeding, it may not be instituted in the United States District Court until the administrative procedure has been followed, and the controversy has become a "civil action."

A state may grant the sovereign power of eminent domain to governmental subdivisions, or to private corporations whose business serves the public interest. It may provide that such power shall be exercised in an administrative proceeding, or by a civil action in the courts of the state. If the state requires such powers be exercised in a court of the state, then the proceeding constitutes a "civil action" within the meaning of Tit. 28, Sec. 1332, U.S.C.A., and may be commenced in the Federal Court. This is the exact situation which was presented in *Madisonville Traction Co. vs. St. Bernard Mining Co.*, 196 U.S. 239, 49 L. Ed. 462. The Kentucky statutes there involved provided that condemnation proceedings should be instituted in a local court of inferior jurisdiction, and at all times be under the control and supervision of the judge of that court. Mr. Justice Harlan in speaking for this court took pains to point out that the condemnation proceeding provided for by Kentucky law was "a suit" or "controversy between citizens of different states" within the meaning of the Constitution and laws of the United States. He said:

"It was, as already said, a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky, as ordained by its Constitution; and the court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record."

The cases of *Mississippi & Rum River Boom Co. vs. Patterson*, 98 U.S. 403, 25 L.Ed. 206 and *Searl vs. School District*, 124 U.S. 197, 31 L.Ed. 415, recognize that if state law provides for a judicial proceeding in eminent domain cases, then such proceeding is a "civil action" within the meaning of Federal statutes.

The state law of Illinois considered by the Court of Appeals for the Seventh Circuit in *Franzen vs. Chicago, Milwaukee and St. Paul Railroad Company*, 278 Fed. 370, likewise required that condemnation proceedings be commenced in a state court of record, and at all times be under the direction of judicial officers of the state. The Seventh Circuit Court of Appeals was careful to point out this salient requirement of state law in its opinion. Likewise, the Pennsylvania statutes considered in *Williams Livestock Company vs. D.L.&W. R.R. Co.*, 285 Fed. 796, provided for a judicial action in the Court of Common Pleas in condemnation cases, and all steps to be taken, including the appointment of "viewers," were under the control of the judge of that court. Judge Riley's opinion in the District Court in the case at bar cited these authorities in support of his statement that an action for taking real estate under power of eminent domain is a "civil action" and may always be brought in a Federal Court in diversity cases when the amount in controversy exceeds the jurisdictional minimum. This fundamental error seems to have pervaded the thinking of both the District Judge and the majority of the Court of Appeals, for Judge Collet points out that "civil actions in the U. S. District Courts are not initiated by a request to a sheriff that he appoint commissioners to assess damages." (Record 103).

The Eighth Circuit Court of Appeals has itself recognized that eminent domain proceedings may neither be commenced in, nor removed to, a U. S. District Court when

applicable state laws provide for an administrative proceeding before non-judicial officers. In the two cases of *Des Moines Water Company vs. City of Des Moines*, 206 Fed. 657, and *Kaw Valley Drainage District vs. Metropolitan Water Company*, 186 Fed. 315, efforts were made to remove administrative proceedings for condemnation of land direct to the United States Courts, before awards had been made by administrative officers. The same court which decided the case at bar, composed of different judges of course, held that the United States Courts were without jurisdiction "until the proceedings assume the character of a civil action." The opinion of the District Court considered, but, we believe, misapplied these precedents from the Eighth Circuit Court of Appeals; whereas, the opinion of the Appeals Court entirely ignored them, although cited in the Briefs of petitioner.

The Supreme Court of Iowa in *Chicago & Northwestern Railway Company vs. Myers*, 118 Iowa 312, 91 N.W. 1076, likewise held that the proceeding before the sheriff was merely "in the nature of an inquest", not judicial in character, and could not have been instituted in the first instance in a District Court of the United States. The Court of Appeals first said that it was unnecessary to decide the question here under consideration, and in overruling the petition for rehearing reiterated the statement. In this respect we submit the Appeals Court was in error, for if the action before the sheriff was administrative in character, as everyone agrees it was, then petitioner did not institute a judicial proceeding when it requested the sheriff to appoint commissioners to assess damages. The proceeding prescribed by Iowa law has none of the requisites of a "civil action" until it is appealed to the courts.

II.

A.

After taking all steps required by state administrative procedure under Iowa law petitioner properly commenced its action in the United States District Court, if under Federal law, it be a plaintiff in such proceeding.

We have heretofore pointed out that Iowa statutes provide that upon appeal from the award of sheriff's commissioners condemnor is the defendant and the landowner the plaintiff. This court in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629, held that the Federal courts must disregard the designation of the parties applied by state law and decide the question for themselves, based on the proper character of the parties, and there a non-resident landowner whose property was being appropriated by a resident railroad corporation was a defendant in the appeal and could remove the action from an Iowa court to the United States District Court.

A non-resident condemnor who finds it necessary to institute the action provided by Iowa law is either a plaintiff or a defendant. If condemnor be a plaintiff, then certainly he cannot properly be denied access to the Federal Court if he commences his action therein at the earliest possible time. The record discloses that petitioner came to the Federal court when the administrative procedure was concluded. The majority of the Court of Appeals held that petitioner did not properly invoke Federal jurisdiction because it served upon the landowners and the sheriff a notice of appeal required by state law advising them that the appeal would be docketed in the United States District Court, on or before a day certain. The notice of appeal was required by state law to convert the administrative proceeding into a judicial action in the courts. Had peti-

tioner served no notice of appeal, then under state law the award of sheriff's commissioners was an absolute finality. A majority of the Court of Appeals also said that petitioner had strictly followed the Iowa procedure for instituting a condemnation suit in the Iowa courts; that "the complaint filed in the United States District Court after the appeal was lodged there was required by the Iowa statute, and a similar complaint was filed in the Iowa District Court after the appeal to that Court."

This statement of the majority opinion is erroneous. Under Iowa law a condemnor does not file any complaint in the state court. This is done by the landowner, the plaintiff. The complaints filed in the cases appealed to the state court were filed by the landowners (Record 49-55) and not by this petitioner. Equally erroneous is the conclusion of the majority that the complaint filed in the United States District Court "cannot be treated as having created an original action in the Federal Court." We must confess that we cannot understand this statement of the majority opinion. We have always understood that a suit was commenced in a United States District Court by filing a complaint. Rule 3, Federal Rules of Civil Procedure so states. Indeed, petitioner certainly could not, under the Rules, have taken any steps to commence an original action in the Federal Court except by filing a complaint.

It is true that the complaint contained allegations concerning the prior administrative action before the sheriff, not before the state court. These were included to show that the hearing before commissioners referred to in Rule 71-A had already been had. Furthermore, counsel for petitioner requested that a summons be issued, and caused it to be served by the Marshal (Record 9). If the action in the Federal Court had been instituted by serving the notice of appeal on the sheriff and landowners, this step would have been quite unnecessary. What petitioner did was sim-

ply to follow Iowa law through the steps necessary to convert the administrative proceeding into a suit, or a "civil action"; then immediately took all proper jurisdictional steps for the commencement of its civil action in the proper United States District Court.

Much confusion seems to have arisen in the minds of the judges of the two courts below because of the provision of the Iowa statutes providing for an "appeal" from the administrative award to the state court. Had the Iowa law provided for the administrative proceeding before the sheriff, and then stated that any party might commence an action before any court of competent jurisdiction, where the case should be tried anew by ordinary proceedings, no difficulty would have arisen.

It seems to be well settled by the decisions of this and various Courts of Appeal that if state statutes create rights, provide for their determination in administrative proceedings and a review by a suit in state courts, the judicial review action may be commenced in a Federal Court if diversity of citizenship and jurisdictional amount appear.

Thus, in *Associated Industries Assurance Corp. vs. Ellis*, 16 F.(2d) 464, affirmed by the Fifth Circuit Court of Appeals in 24 F.(2d) 809, it was held that a civil action to review an administrative award of Workmen's Compensation was properly brought in a Federal Court, although state law provided only for state court action. The Eighth Circuit Court of Appeals in *Texas Pipe Line Co. vs. Ware*, 15 F. (2d) 171, followed the same rule with respect to the Louisiana Workmen's Compensation Act, which is, by state law administered in a civil action brought in state courts. The Court of Appeals for the Eighth Circuit held that the suit provided by state law was a "civil action" and might be instituted in either state or Federal Courts in a diversity case. Judge Kenyon speaking for the Eighth Circuit Court

quoted from the decision of this court in *Davis vs. Gray*, 16 Wall. 203, 221, 21 L.Ed. 447:

"A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality."

If there be any question about the right of petitioner to invoke the original jurisdiction of the Federal Court, although state law provides only for an appeal to a state court, it has been decided by this court in the recent case of *Burford vs. Sun Oil Co. et al*, 319 U.S. 315, 87 L.Ed. 1424. In that case it appeared that Texas had adopted a rationing program regulating the drilling of new oil wells within the state. The statute provided for an administrative proceeding before the state Railroad Commission, with an appeal therefrom to a state equity court. Burford applied to the Commission for a permit to drill wells and was granted such authority. Sun Oil Company instituted an equity action to set aside the permit and order of the Commission in the United States District Court, which declined to take jurisdiction. The Fifth Circuit Court of Appeals reversed the judgment of dismissal. This court granted certiorari, and in the opinion of the majority written by Mr. Justice Black, jurisdiction of the District Court was sustained, although the majority held that because of the nature of the case, the District Court should have declined to take original jurisdiction and the parties should have been remitted to state courts because of possible conflict between state and Federal authority. This Court there said:

"Jurisdiction of the federal court was invoked because of the diversity of citizenship of the parties, and because of the Companies' contention that the order denied them due process of law. There is some argument that the action is an 'appeal' from the State Commission to the federal court, since an appeal to a state court

can be taken under relevant Texas statutes; but, of course, the Texas legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the Circuit Court of Appeals in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order."

From the foregoing it seems to us very clear that (1) petitioner's administrative proceeding under state law was not a "civil action" within the meaning of Tit. 28, Sec. 1332, U.S.C.A., and could not be brought initially in Federal Court, and (2) petitioner's civil action was commenced in the Federal Court at the earliest permissible time. The only remaining question is whether under the law petitioner was a proper plaintiff in the action. Whether petitioner is plaintiff or defendant must, of course, be determined by Federal law since state statutes cannot control suits in national courts.

We believe that condemnor under the circumstances here shown was properly designated a plaintiff in the "civil action" commenced in the United States District Court for Southern Iowa. If the whole condemnation proceeding be viewed in its entirety, it is quite clear that petitioner is a plaintiff in the proceeding.

This court pointed out in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629, 27 S.Ct. 321, that the whole proceeding was instituted for the purpose of acquiring land against the will of the owner; that condemnor instituted the proceeding and that the necessity of the railroad company to acquire title "is the main spring of the proceedings from beginning to end, and the persistence of that intention is the condition of their effect."

If the so-called "appeal" from the administrative award be considered as a lawsuit, separate and apart from the initial proceedings before the sheriff's commissioners, peti-

tioner is still plaintiff in the action. While the landowner filed answer to the petitioner's complaint and a counterclaim in which he seeks an increase in the amount of damages awarded, petitioner is still the active party who initiated the proceeding, and who seeks affirmative relief from an excessive and unjust award of damages returned in the administrative proceeding. Petitioner in effect seeks to set aside the award and to substitute therefor one which it believes more equitable and just. It seems clear, therefore, that viewed in any light, petitioner was properly designated as plaintiff and properly invoked the original jurisdiction of the United States District Court.

III.

A.

If petitioner be not a plaintiff in the proceeding, it is necessarily a defendant as provided by state law and, as such, entitled to remove the case from the state court to the United States District Court.

If petitioner was not a proper party plaintiff to institute a civil action invoking the original jurisdiction of the Federal Court, we believe it necessarily follows that it was a defendant as provided by state law. If petitioner be a defendant, then it is clear that under the provisions of Tit. 28, Sec. 1441, U.S.C.A. it was entitled to remove the case from the state court.

Judge Riley held that petitioner was a defendant in the action, since the land had been acquired in the administrative proceeding, and possession had been secured under state law by depositing the amount of the award with the County Sheriff; leaving only the issue of damages, to which the landowner and his tenant were entitled, for trial in the civil action on appeal. In the removal cases the landowners

filed their petitions as required by state law and thereby raised only the issue of the amount of damages to which they were entitled. Judge Riley said that for all essential purposes petitioner was both a "nominal and an actual defendant". It is certainly true that petitioner is in the position of defending against claims made against it for the taking of respondents' lands.

If the whole process of eminent domain provided by Iowa law be considered as two proceedings, one administrative in character before the sheriff and the other judicial in nature before the courts, petitioner has all the attributes of a defendant in the lawsuit. While it seems to us that the better view is that petitioner was a plaintiff, and therefore properly instituted an original action in the United States District Court, if we are in error in this respect, it necessarily follows that the removal cases properly invoked the jurisdiction of the Federal Courts and that the Court of Appeals erred in holding that petitioner could be neither plaintiff nor defendant in the District Court of the United States.

B.

The majority opinion of the Court of Appeals has improperly construed the opinion of this court in Mason City & Fort Dodge R. R. Co. vs. Boynton.

A majority of the Court of Appeals held that the decision of this court in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629, required a reversal of the ruling of the trial court upon the landowners' motion to remand. While petitioner consented that the Court of Appeals might consider the appeal of the landowners from this ruling, we are of the opinion that the matter was not properly before the court below. Petitioner appealed from a judgment of dismissal in the case in which it was plain-



tiff. The landowners attempted to appeal from an order overruling a motion to remand in a case separately docketed, which was not consolidated in any manner with petitioner's first suit. Under these circumstances, we do not believe that the rule of *Deckert vs. Independence Shares Corp.*, 311 U.S. 282, 85 L.Ed. 189, governs so as to justify consideration of a non-appealable order. It has never been held by any court to our knowledge that a proper appeal in one case brings before the court the record in a wholly separate non-consolidated case, so as to justify review of a non-appealable order by a Court of Appeals.

We believe that the Court of Appeals was in error in holding that the *Boynton* case was decisive of the case at bar. In the *Boynton* case a resident railroad corporation of Iowa instituted a condemnation proceeding against a non-resident for the taking of certain lots in the City of Carroll, Iowa. A small award was made in the administrative proceeding and the landowner appealed to the state district court and caused the case to be there docketed; then filed a petition for removal to the United States District Court, where the case was tried, and a judgment entered fixing the landowner's damages at a much higher figure than the amount awarded by sheriff's commissioners. The railroad appealed to the Court of Appeals and there contended that, although it had filed no motion to remand, the landowner had improperly removed the case, and the District Court was without jurisdiction. The Court of Appeals for the Eighth Circuit certified to this court four questions which it desired this court to answer. This court in an opinion written by Mr. Justice Holmes and characteristically short, answered in the affirmative only the first question certified; namely, "Was the landowner a defendant within the removal statutes?"

Mr. Justice Holmes pointed out that the Iowa Supreme Court in *Myers vs. C&NW R.R. Co.*, 118 Iowa 312, 91 N.W.

1076, had held that under Iowa law a non-resident corporation was the defendant in an appeal from an administrative condemnation award and had a right to remove the case to a Federal court. Mr. Justice Holmes then said that the decision of the Iowa Supreme Court was not binding on Federal Courts as to a question of Federal law and that:

"In condemnation proceedings the words 'plaintiff' and 'defendant' can be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can. It is not necessary, in order to decide that the present removal was right, to say that the state decision was wrong. We leave the latter question where we find it."

It is apparent, therefore, that all that was decided in the *Boymton* case was that a landowner was a defendant so as to be entitled to remove a case arising under the Iowa statutes to a Federal court. Mr. Justice Holmes' opinion does not intimate whether the dual character of the actors prevents a condemnor in possession from being a defendant with respect to damages. Ordinarily it is true that two contending parties cannot be defendants in a lawsuit. If the condemnation proceeding be viewed in its entirety, and from its inception as one proceeding, we concede that a condemnor has more resemblance to the traditional concept of a plaintiff than of a defendant. But if the status and positions of the parties in the civil action before the courts be considered, apart from the prior administrative proceedings, then the position of a condemnor is more nearly that of a defendant than a plaintiff.

An analysis of Mr. Justice Holmes' opinion does not support the conclusion of the Court of Appeals that it is absolutely decisive of the question presented by this record.

We believe that a majority of the Court of Appeals gave to the *Boynton* case undue weight.

The fact remains that in the civil action before the courts contemplated by the Iowa statutes, petitioner must be either a plaintiff or a defendant. If petitioner's status was that of a plaintiff as the *Boynton* case suggests, then petitioner properly invoked the original jurisdiction of this court; and the Court of Appeals' decision is erroneous. If petitioner's position in the litigation be that of a defendant, then it was entitled to invoke Federal jurisdiction by removal of the case from the state court; and the majority of the Court of Appeals was wrong. Petitioner attempted to preserve all rights to which it was entitled by invoking Federal jurisdiction, both by filing an original action and by following state law, then removing the case to the United States District Court. We believe that it was clearly entitled to have the cases tried in the United States District Court. The amount of the awards returned by the sheriff's commissioners in the administrative proceeding demonstrates that local prejudice must have been a potent factor influencing the size of the awards of damages.

IV.

Petitioner's action in instituting the administrative proceeding before the Iowa sheriff complied with the requirements of Rule 71-A(k).

Rule 71-A governing the procedure in the Federal courts in eminent domain cases arising under both Federal and state laws took effect on August 1, 1951. Subdivision (k) of this rule states:

"The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for

trial of the issue of compensation by jury or commission or both, that provision shall be followed."

Our examination of the authorities has revealed no cases construing Rule 71-A from the Federal courts involving condemnation proceedings under state law.

It is, of course, quite fundamental (although the contrary was contended for by counsel below) that Rule 71-A is a mere procedural rule. None of the Federal Rules of Civil Procedure effects either jurisdiction or venue of District Courts of the United States (See Rule 82, Federal Rules of Civil Procedure). It is plain, therefore, that the jurisdiction of the United States District Court was in no way enlarged by Rule 71-A.

We have heretofore pointed out that a Federal Court could not have entertained an administrative proceeding provided for by state law. Since Rule 71-A does not enlarge the jurisdiction of the District Courts, and since the rule requires that state law with respect to proceedings before a commission shall be followed, the only action which petitioner could have taken to comply with Rule 71-A(k) was to proceed as it did. No other course was open to petitioner.

CONCLUSION.

All agree that this cause presents a controversy wholly between citizens of different states in which more than \$3,000 is involved. Everyone agrees that the suit contemplated by the Iowa statutes is a civil action. Under these circumstances, it is manifest that the non-resident condemnor, if it be the plaintiff in the action, had a right to institute the action in a District Court of the United States. If condemnor be not a plaintiff but a defendant in the action, then it is equally plain that it is, by virtue of the removal statutes, entitled to have the case litigated in a Federal tribunal rather than in courts of the state.

The reported cases disclose that for a period of fifty years there has been uncertainty and doubt as to the proper procedure to be followed by a non-resident condemnor of land in Iowa, and the uncertainties were not dispelled by the decision of this court in *Mason City & Fort Dodge R.R. Co. vs. Boynton*. They have been multiplied by the decisions of the Court of Appeals in the case at bar. Because of those uncertainties, petitioner in this case invoked the jurisdiction of the United States District Court at the earliest possible time, by filing an original action and also by proceeding under state law to appeal the case to the state court, and remove it to the Federal Court for trial. The Court of Appeals has held that a non-resident condemnor of Iowa real estate may not have access to the Federal Courts. We believe that this decision denies to petitioner fundamental rights guaranteed by the statutes of the United States.

We submit that the perplexing question should be decided by this court; that this case is one calling for the exercise by this court of its supervisory powers over the judgments and decrees of Courts of Appeal. In order that the manifest errors committed by the Court of Appeals for the Eighth Circuit may be corrected, and petitioner may have the benefit of the rights to which it is entitled under the statutes of the United States, a writ of certiorari should be granted. This court should review the decision of the Eighth Circuit Court of Appeals and reverse it.

Respectfully submitted,

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APPENDIX.

(All section references are to the Code of Iowa, 1950.)

Section 471.6. Railways. Any railway, incorporated under the laws of the United States or of any state thereof, may acquire by condemnation or otherwise so much real estate as may be necessary for the location, construction, and convenient use of its railway. * * *

Section 472.3. Application for condemnation. Such proceedings shall be instituted by a written application filed with the sheriff of the county in which the land sought to be condemned is located. Said application shall set forth:
* * *

Section 472.4. Commission to assess damages. The sheriff shall thereupon, except as otherwise provided, appoint six resident freeholders of his county, none of whom shall be interested in the same or a like question, who shall constitute a commission to assess the damages to all real estate desired by the applicant and located in the county.

Section 472.8. Notice of assessment. The applicant, or the owner or any lienholder or encumbrancer of any land described in the application, may, at any time after the appointment of the commissioners, have the damages to the lands of any such owner assessed by giving the other party, if a resident of this state, ten days notice, in writing. Such notice shall specify the day and the hour when the commissioners will view the premises, and be served in the same manner as original notices.

Section 472.14. Appraisal—report. The Commissioners shall, at the time fixed in the aforesaid notices, view, if necessary, the land sought to be condemned and assess the damages which the owner will sustain by reason of the appropriation, and file their written report with the

sheriff. The appraisalment and return may be in parcels larger than forty acres belonging to one person and lying in one tract, unless the agent or attorney for the applicant, or the commissioners, have actual knowledge that the tract does not belong wholly to the person in whose name it appears of record. In case of such knowledge the appraisalment shall be made of the different portions, as they are known to be owned.

Section 472.17. When appraisalment final. The appraisalment of damages returned by the commissioners shall be final unless appealed from.

Section 472.18. Appeal. Any party interested may, within thirty days after the assessment is made, appeal therefrom to the district court, by giving the adverse party, his agent or attorney, and the sheriff, written notice that such appeal has been taken.

Section 472.21. Appeals—how docketed and tried. The appeal shall be docketed in the name of the owner of the land, or of the party otherwise interested and appealing, as plaintiff, and in the name of the applicant for condemnation as defendant, and be tried as in an action by ordinary proceedings.

Section 472.22. Pleadings on appeal. A written petition shall be filed by the plaintiff on or before the first day of the term to which the appeal is taken, stating specifically the items of damage and the amount thereof. The defendant shall file a written answer to plaintiff's petition, or such other pleadings as may be proper.

Section 472.23. Question determined. On the trial of the appeal, no judgment shall be rendered except for costs, but the amount of damages shall be ascertained and entered of record.

Section 472.25. Right to take possession of lands. Upon the filing of the commissioners' report with the sheriff,

the applicant may deposit with the sheriff the amount assessed in favor of a claimant, and thereupon the applicant shall, except otherwise provided, have the right to take possession of the land condemned and proceed with the improvement. No appeal from said assessment shall affect such right, except as otherwise provided.